26 May 2021


ACT
Association of Commercial Television in Europe


ANICA
Associazione Nazionale Industrie Cinematografiche Audiovisive e Multimediali


CEPI
EUROPEAN AUDIOVISUAL PRODUCTION


CICAE
ARTHOUSE CINEMAS


EUROCINEMA
Association de producteurs de cinéma et de télévision


EUROCOPYA
European Federation of Joint Management Societies of Producers for Private Audiovisual Copying


EUROPA DISTRIBUTION


EUROPA INTERNATIONAL


The European Producers Club (EPC)


fedicine


FERA
Federation of European Screen Directors
Fédération Européenne des Réalisateurs de l'Audiovisuel


FIAD
INTERNATIONAL FEDERATION OF FILM DISTRIBUTORS' ASSOCIATIONS


FIAPF
FILM PRODUCERS WORLDWIDE


fse
FEDERATION OF SCREENWRITERS IN EUROPE


Independent Film & Television Alliance


iVF
INTERNATIONAL VIDEO FEDERATION
Publishers of Audiovisual Content on Digital Media and Online


MEDIAPRO


MPA
EUROPE, MIDDLE EAST & AFRICA


SPIO
Spitzenorganisation der Filmwirtschaft e.V.


UNIC
UNION INTERNATIONALE DES CINÉMAS
INTERNATIONAL UNION OF CINEMAS


VAUNET
Verband Privater Medien

Joint Position on the proposed EU Digital Services Act

The undersigned organisations represent key stakeholders in the film and audiovisual creation, production, exhibition and distribution value chain. We welcome the Commission's proposal on the **Digital Services Act** (DSA) and fully support the objectives of better protecting citizens online by building a safer internet; of establishing a strong transparency and accountability framework for online intermediaries; and of creating an environment which fosters innovation and economic growth for legitimate online actors. The European Commission's proposal is a good start, but it leaves some critical gaps. Closing these gaps is the only way to ensure that the DSA achieves its stated policy goals, including providing a future proof and resilient legislative framework.

Relationship between the DSA and Copyright: DSA Art. 1(5), Rec. 11

The proposed DSA is of great relevance to the film and audiovisual sector. The DSA is intended as a horizontal framework covering all categories of content, products, and activities of intermediary services, guaranteeing harmonized conditions for the development of cross-border services and addressing the risk of legal fragmentation caused by divergence of Member State regulatory and supervisory approaches, except when a more specific rule applies (*lex specialis*). In order to promote legal certainty, the basic approach in EU law is to mention such rules in the scope provision of a legislative instrument. In this regard, Article 1(5) specifies some of the relevant *lex specialis* rules and in particular states that the **DSA Regulation "is without prejudice to the rules of Union law on copyright and related rights,** which establish specific rules and procedures that should remain unaffected" (see Article 1(5)c and Recital 11).

However, given the overlap between the DSA and copyright legislation, particularly when it comes to procedural harmonization (notice and action, injunctions, orders for information), the vague assurances in Recital 11 and Article 1(5) are insufficient. **It is important to ensure that the more specifically tailored protection established by EU acquis, CJEU case law and relevant Member State provisions relating to intellectual property rights are in no way prejudiced or weakened[1].**

Although copyright has a *lex specialis* relationship with the DSA, given its horizontal nature, the latter will still apply where no specific copyright rules are relevant. For example, the DSA will apply with respect to certain intermediaries that are not covered by Article 17 of the DSM Copyright Directive. As a result, the DSA will have relevance to copyright infringement in a number of important areas.

Liability: DSA Art. 3-5, Rec. 17-22

The DSA proposal deletes Articles 12-14 of the E-Commerce Directive and reproduces them in Articles 3-5 of the DSA Regulation. This of course also means that these provisions - as part of the overall DSA Regulation - can be subject to amendments through-out the legislative process. To achieve its objectives, **the DSA should in no way increase the liability privileges provided to intermediary service providers** and should ensure that no liability privilege is given to services that:

[1] E.g. Directives 2019/790, 2004/48/EC, and 2001/29/EC.

- **have a 'main purpose' to engage in or facilitate illegal activities** – Recital 20 clarifies that liability privileges are not available to services that "deliberately collaborate" with an infringer. This is extremely difficult to prove in the real world and should be reformulated to capture all services whose main purpose is to engage in or facilitate illegal activities.
- **claim to be neutral but in fact are designed to promote or optimise certain content -** Recital 25 would appear to broaden the hosting liability safe harbour by reference to "services provided neutrally" (rather than "passive") and this is juxtaposed with editorial responsibility. An amendment should clarify that reference to editorial responsibility is non-exhaustive by thoroughly reflecting the CJEU case law (L'Oréal/eBay) on optimization and promotion of content.
- **or, more generally, do not meet basic due diligence obligations –** making compliance with the due diligence obligations contained in the DSA proposal a pre-condition for liability exemption eligibility contributes to a high level of safety and trust online. A conditional relation between the safe harbour provisions and the due diligence obligations would create an additional incentive for compliance with the due diligence obligations, particularly for intermediaries that can afford any resulting fines for non-compliance and often factor them in as a cost of doing business.

Measures against illegal content: DSA Art. 8 and 9, Rec. 26 and 28

Furthermore, the DSA proposal should **ensure that currently available measures against illegal content are preserved and not rendered more burdensome**. Specifically, Recital 26 unhelpfully states that where possible, third parties affected by illegal content transmitted or stored online should attempt to resolve conflicts relating to such content without involving the providers of intermediary services in question, disregarding the fact that **intermediaries are often better placed to address illegal content in an effective manner.**

Article 7 more or less reproduces the e-Commerce Directive **prohibition on imposing a general monitoring obligation** on intermediaries and Recital 28 helpfully clarifies that "this does not concern monitoring obligations in a specific case". However, Recital 28 should be amended explicitly to clarify that this **should not prevent providers from undertaking proactive measures to identify and remove illegal content or prevent its reappearance**. We respectfully encourage co-legislators to consider reproducing in Recital 28 wording from the DSA Explanatory Memorandum referencing the Facebook Case C-18/18.

Lastly, **Articles 8 and 9 seem to increase red tape and unnecessarily interfere in Member States' laws**, for example by imposing procedural conditions on in-Member State injunctions. It is essential that the DSA limits the application of these articles to cross-border injunctions.

Notice & Action: DSA Art. 14-21

In order to ensure safety and trust online, notice and action procedures should be proportionate, effective and future proof. The Commission's proposal to harmonise notice and action processes is welcome - but fails to require any prompt and meaningful results. The DSA should therefore be amended to include a clear obligation for intermediaries to:

- **act expeditiously, including and especially for time-sensitive content, upon receipt of a notice flagging illegal content or otherwise gaining knowledge or awareness of illegal activity, or illegal content, by taking the content down;**
- **prevent content that has been taken down from reappearing (i.e. stay-down).**

Moreover, in order to ensure that notice and action procedures are future proof and do not lead to overly bureaucratic and inefficient procedures **the DSA should not require the 'exact URL' to identify illegal information.** This technology-specific requirement is already outdated, given that many applications no longer rely on URL technology. The URL requirement could be seen as or turned into a prohibition for hosting providers to take down the illegal content from another location than the exact notified URLs. It could therefore end up preventing stay-down of infringing content.

The DSA should also ensure that:

- the trusted flagger provision and measures foreseen against *users that frequently provide illegal content* **should cover all hosting providers[2].**

- **trusted flagger status is indeed awarded to trusted flaggers** (Art. 19/Rec. 46, 58) as in notice senders that have demonstrated expertise and a high rate of accuracy when flagging illegal content or those that represent collective interests. Those two criteria should not be made cumulative as doing so would mean excluding rightholders from protecting their own content, despite their expertise and capacity to do so.

- **frequent providers of illegal content cannot exploit loopholes (Art. 20/Rec. 47)** by providing for termination as a sanction, especially when dealing with cases of repeated suspension and by providing for mechanisms to prevent re-registration by suspended or terminated individuals that frequently provide illegal content.

KYBC - Traceability of traders: DSA Art. 22 and Rec. 49

The proposed DSA provides for rules requiring platforms to know the identities of traders using their services to promote messages or offer products or services to EU consumers. Currently, the scope of the provision is too narrow, as it is limited to marketplaces, thereby excluding infrastructure services.

KYBC obligations should also cover infrastructure services relied upon for piracy and other illegal activities, including domain registrars, hosting providers, providers of content delivery networks, advertising and payment service providers **in order to ensure trust and safety online.** Broader KYBC obligations are proportionate because they are easy to implement by all intermediaries with minimal administrative burdens and impose minimal burdens on legitimate businesses, all of which are easily identifiable.

[2] These provisions should be moved to Chapter 2 of the DSA and as such be applicable to any hosting service which may be the conveyor of specific, prevalent, and damaging types of pirated content.

Additional obligations for Very Large Online Platforms (VLOPs) – Risk assessment & audits Art. 26 and 28

The criteria for risk assessment under Art. 26 should reflect the right to property as fully protected by Article 17 of the Charter of Fundamental Rights of the European Union. We recall the importance of independent and verifiable audits and the requirement for VLOPs to implement the audit recommendations without delay.

Signatories

ACT - Association of Commercial Television in Europe
ANICA - Associazione Nazionale Industrie Cinematografiche Audiovisive Multimediali
CEPI - European Audiovisual Production Association
CICAE - International Confederation of Art Cinemas
Eurocinema - Association de producteurs de cinéma et de télévision
Eurocopya - European Association of Audiovisual & Film Producers' private copy collective management societies
Europa Distribution - European Network of Independent Film Publishers and Distributors
Europa International - European organization for films international distributors
EPC - European Producers Club
Fedicine - Federación de Distribuidores Cinematográficos
FERA – Federation of European Screen Directors
FIAD - International Federation of Film Distributors' Associations
FIAPF - International Federation of Film Producers Associations
FSE – Federation of Screenwriters in Europe
IFTA – Independent Film & Television Alliance
IVF – International Video Federation
Mediapro
MPA – Motion Picture Association
SPIO – Spitzenorganisation der Filmwirtschaft e.V.
UNIC - International Union of Cinemas
Vaunet – Verband Privater Medien e.V.

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